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No. 76-1212

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCESCO SCIBELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 222.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the applications for orders authorizing electronic surveillance sufficiently established that other investigative procedures were inadequate.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Massachusetts, petitioner and eight co-defendants were convicted of operating an illegal gambling business in violation of 18 U.S.C. 1955, and of conspiring to commit that offense in violation of 18 U.S.C. 371. Petitioner was sentenced to 18 months' imprisonment, subject to the parole provisions of 18 U.S.C. 4208(a)(2), and a fine of $7,500. The court of appeals affirmed (Pet. App. A).

The facts are set out in the opinion of the court of appeals (Pet. App. 10-14). A six-month investigation, commencing in June 1974, preceded this prosecution. During that investigation, the government derived certain evidence from three periods of court-authorized electronic surveillance. The order authorizing the first surveillance was issued on October 15, 1974, pursuant to an application by the government supported by a 78-page affidavit of Agent Alan G. Ringgold of the Federal Bureau of Investigation. It authorized electronic surveillance of a telephone in a bar, the Gaslight Room, for 21 days.[1] Two other orders, issued on November 14, 1974, and December 10, 1974, authorized the surveillance of six additional telephone numbers for 21 and 20 days, respectively.[2] The affidavit supporting each application incorporated by reference all preceding affidavits, represented that normal investigating procedures

[1]The order also authorized electronic surveillance of a telephone at another business establishment and the use of a listening device at the Gaslight Room (C.A. App. 59). Although such a device was installed, no useful evidence was obtained through it (Pet. App. 13, 19).

[2]We are lodging copies of the affidavits supporting the applications for the three orders with the Clerk of this Court. They are identified as EBD 74-224, EBD 74-275 and EBD 74-295.

had failed, and described why such efforts were unlikely to succeed in light of the particular circumstances of this investigation (Pet. App. 12-14, 17-19).[3]

The evidence derived from these three orders was subject to a motion to suppress, based in part on the ground that the government failed to comply with 18 U.S.C. 2518(1)(c), which requires the government in making application for an electronic surveillance order to establish that other investigative procedures are inadequate. After a hearing, the district court denied petitioner's motion to suppress evidence. Petitioner waived a jury trial and entered into a stipulation that, considered together with the transcripts of the electronic surveillance, show that petitioner and his co-defendants conducted an extensive gambling operation, in large part over telephones (Pet. App. 10-11).

ARGUMENT

Petitioner asserts (Pet. 4-7) that the affidavits in support of the government's applications for orders authorizing electronic interception failed to show that "other investigative procedures have been tried and

[3]These circumstances included the fact that the informants were unwilling to testify for fear of their personal safety, and that the one informant who had testified before a grand jury under a grant of immunity had not given useful evidence (Pet. App. 12-13). While physical surveillance inside the Gaslight Room had shown a suspicious pattern of conduct and association, its continuation risked disclosure of the investigation and was unlikely to produce sufficient proof for conviction, since "the subjects continually utilize the table in the right rear area of the lounge on a consistent basis in order to hold subdued conversation" (Pet. App. 13). Moreover, the same subjects frequented a private back room of the bar (EBD 74-224 pp. 71-72). The affidavit supporting the second order reported that the listening device installed in the Gaslight Room had not been useful, due to the high extraneous noise level, and contained facts showing that the subjects were becoming extremely sensitive to scrutiny (Pet. App. 13-14; EBD 74-275 pp. 34a-b, 37-38.

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failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c).

We have recently discussed the requirements of Section 2518(1)(c) in our briefs in opposition to certiorari in *Scully* v. *United States*, No. 76-5918, certiorari denied, April 18, 1977; *Anderson* v. *United States*, No. 75-500, certiorari denied, February 28, 1977; *Feldman* v. *United States*, No. 76-113, certiorari denied, November 8, 1976; *Pezzino* v. *United States*, No. 75-6651, certiorari denied, October 4, 1976; *Steinberg* v. *United States*, No. 75-1040, certiorari denied, 425 U.S. 971; *Green* v. *United States*, No. 75-962, certiorari denied, 425 U.S. 950; and *Lawson* v. *United States*, No. 75-659, certiorari denied, 424 U.S. 927.[4] In those discussions we noted that the requirements of Section 2518(1)(c) are satisfied when the affidavit, read in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows a sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain the full scope of their activities and identify the participants. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Steinberg*, 525 F. 2d 1126, 1129-1131 (C.A. 2), certiorari denied, 425 U.S. 971; *United States* v. *De La Fuente*, 548 F. 2d 528, 537-538 (C.A. 5); *United States* v. *Jackson*, 549 F. 2d 517, 536-537 (C.A. 8); *United States* v. *Landmesser*, C.A. 6, No. 76-1540, decided April 18, 1977.

[4]We are sending petitioner's counsel copies of our briefs in *Scully* and *Green*.

Both courts below correctly found that the affidavits here provided such a factual basis (Pet. App. 16-19). The affidavit of Agent Ringgold accompanying the first application for an intercept order clearly indicates that, after several months of investigation, the informants who were familiar with the gambling operation and had provided useful information were afraid to testify and the one informant who had testified under a grant of immunity was unable or unwilling to give useful information. The affidavit also detailed the information derived from physical surveillance, explaining that further physical surveillance would provide only cumulative evidence, insufficient to sustain a conviction, because of the described physical layout of the premises where most of the personal transactions between the subjects took place. The second affidavit incorporated the initial affidavit and alleged in addition that the listening device was not providing sufficient information because of extraneous noise, that several targets of the investigation were becoming suspicious of law enforcement scrutiny,[5] and that the informants continued to refuse to testify. The final affidavit, incorporating by reference the other two, concluded that additional authorization was necessary in order to identify certain individuals, known to be involved in the scheme, and to monitor the new location of the operation. As the court of appeals found (Pet. App. 19): "Considering together all factors mentioned in each affidavit, each was sufficient for the district court to find it met the requirement of section

[5]The operation did subsequently change its telephone number.

2518(1)(c)."[6] Further review of this essentially factual determination is unwarranted.

Petitioner nevertheless contends (Pet. 7-8) that this Court should resolve the conflict between this decision and that of a panel of the Ninth Circuit in *United States* v. *Kalustian*, 529 F. 2d 585. We agree that the *Kalustian* panel appears to have interpreted 2518(1)(c) to require greater specificity in the supporting affidavits than other panels of the Ninth Circuit or panels of other circuits.[7] The divergence is not, however, as serious as petitioner suggests. In the first place, the standard petitioner quotes as representing the Ninth Circuit's current position (Pet. 7-8) was excised from the *Kalustian* opinion when it was modified on December 11, 1975, and therefore evidently does not now represent the views even of that panel. See 529 F. 2d at 590.

Moreover, another panel of the Ninth Circuit has recently recognized that the circuit's decisions in this area "often lead to results difficult to harmonize" and has tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." *United States* v. *Spagnoulo*, 549 F. 2d 705, 709-710. The standard that it adopted is that the "affidavit, read in its entirety, must give a factual basis

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[6]The court of appeals correctly concluded (Pet. App. 18 n. 5) that it was not necessary for the government to show that the informants had been offered immunity, protective custody, or a new identity if they would testify. To the extent that refusal to testify was based on fear, immunity would have been ineffective—indeed, the affidavits did show that it had been tried without success in one instance. In any event, as the court of appeals noted, Section 2518(1)(c) does not mean that electronic surveillance can be used only after "every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Accord, *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913.

[7]See cases cited, *supra*, p. 4.

sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with 2518(1)(c). *Kalustian* teaches no more than that" (549 F.2d at 710). Tested by that standard, the instant affidavits are clearly sufficient since they contain ample particular facts to show the inadequacy of normal investigative procedures in the specific investigation here involved. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere,[8] this case does not directly present that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Since no other court of appeals has followed *Kalustian*, and since efforts are presently being made to prepare affidavits so that they conform to the stringent *Kalustian* standards, we have concluded that it is not necessary for this Court to review the decisions in which various panels of the Ninth Circuit have suppressed evidence on the authority of *Kalustian*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902. Nor do we believe that this essentially intra-circuit conflict requires review by this Court of cases in which the generally prevailing standard is utilized. See, *e.g.*, *Feldman* v. *United States*, *supra*.